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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 276

R. S. RAINWATER, SR., SLOAN RAINWATER, JR., WILLIAM RAINWATER, AS INDIVIDUALS AND AS PARTNERS, D/B/A R. S. RAINWATER & SONS, AND CITIZENS NATIONAL BANK, WALNUT RIDGE, ARKANSAS ..... *Petitioners*

v.

UNITED STATES OF AMERICA ..... *Respondent*

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF

ARGUMENT

It is felt that certain points raised by the United States of America justify further discussion.

I

Marcus v. *Hess Decision*

In *United States ex rel Marcus* v. *Hess,* 317 U. S. 537, 87 L. Ed. 433, the Government had entered into a program of contributing to cost of local improvements. The procedure was for the contractors to submit their bids on the project to local authorities on official United States Government (P.W.A.) forms. Based upon these bids, con-

tracts were entered into and moneys were placed by the Government into certain joint construction accounts together with the funds of the local sponsors. From these accounts payments to the contractors were made. The original bids in reliance upon which the Government made the deposits were collusive and false. This Court held that the collusive bids upon which the Government paid were subject to the *False Claim Act*, 31 U.S.C. 231, notwithstanding the fact they were initially made to the local sponsors and paid by them from the joint construction accounts. It stated that the existence of the intermediary of local sponsors did not constitute a bar to prosecution where the United States had paid on the strength of a false claim.

The Government argues inferentially that the Commodity Credit Corporation occupies the status of an intermediary in claims made upon the United States. Such a position is fallacious in that the basic requirement of both the *False Claims Act* and the *Hess* decision specifies that the United States Government must pay only if, as and when the false claim is made against it. As the Supreme Court said in *Hess*:

> "It was a 'prerequisite to respondents' payment by the local sponsors that these estimates be filed, transmitted to, and approved by, the P.W.A. authorities. Payment was then made from a joint construction bank account containing both federal and local funds. The work was done under constant federal supervision.
>
> "The government's money would never have been placed in the joint fund for payment to respondents had its agents known the bids were collusive. By their conduct, the respondents thus caused the government to pay claims of the local sponsors in order that they might in turn pay re-

spondents under contracts found to have been executed as the result of the fraudulent bidding."

Reliance upon the representation in question by the entity suing is the essence of a cause of action for fraud. In certain cases frauds are actionable although the actual representation was made to one other than the person who relied thereon and was damaged thereby, but the party defrauded must nevertheless show his reliance and damage. This essential requirement was adhered to in *Marcus* v. *Hess*. It is clearly absent here in the case of Commodity Credit Corporation vis-a-vis the United States.

Commodity is not an intermediary which receives claims and transmits them for reliance and payment by the United States. It adjusts, settles and pays claims against it autonomously. To the extent that the United States supplies funds to Commodity Credit Corporation it does so as capital or loans (15 U.S.C. 714(e), 714(b)(1)). These government expenditures have no causal connection with the filing of any of the claims which may be made upon Commodity Credit Corporation in connection with its extensive commercial activities. The Commodity Credit Corporation may make payment on the strength of the claims submitted to it, but with such claims the United States is not concerned.

The rule of construction laid down in *Marcus* v. *Hess*, *supra*, is aimed at the "discovery" and not the "direction" of legislative will. Such discovery reveals that:

1. Congress has clearly stated that Government corporations, such as Commodity Credit Corporation, were not included in R. S. 5438.

2. Congress intended to maintain the independent legal and financial status of its corporations and

particularly of the Commodity Credit Corporation, and not to equate that status with that of the United States. Congress has reiterated this intention subsequent to the decision in *Marcus* v. *Hess*.

II

Interpretation by Congress That Commodity Credit Corporation Is Not the United States or a Department Thereof

In dealing with Government corporations Congress has demonstrated a purpose that they occupy a legal and financial status independent of the Sovereign or any government agency, e. g., the P. W. A. in the *Hess* case. In implementing this purpose Congress was motivated by considerations of policy not applicable to ordinary agencies and with which this Court in *Hess* had no concern.

The Government corporation with an independent legal identity has always presented the problem of weighing the advantages of commercial flexibility which comes from financial autonomy against the need for control to protect the Government as a stockholder. Careful Congressional study of this problem resulted in the enactment of the *Corporation Control Act* of 1945 (31 U. S. C. 841, *et seq.*).

In this Act, Congress clearly rejected a solution of the problem based on assimilating these corporations to the financial status of the Sovereign. Considerations of desired commercial flexibility instead moved Congress to safeguard the Sovereign's rights as a stockholder to full and true reports and accountings from the corporations which it owned.

Indeed, in drafting the *Corporation Control Act*, much care was taken that the protective devices enacted not destroy the independent financial identity of the Govern-

ment corporations, leaving only the legal entity, or, as the Government would now contend, a mere legal "shell". In this connection, the Senate Committee, recommending the *Corporation Control Act*, stated:

> "It is generally agreed that the corporate form loses much of its peculiar value without reasonable autonomy and flexibility in its day-to-day decisions and operations. The budget and financial controls imposed upon the Government corporations should not deprive them of this freedom and flexibility in carrying out authorized programs to a greater extent than is necessary to conform their operations to the program of the Government and the will of Congress." *Senate Report No. 694, 79th Congress, First Session* 1945, *page* 7.

The vital distinction intended by Congress between corporate instrumentalities and financially integrated agencies of the United States was epitomized in the enactment of "business" rather than "governmental" accounting procedures for the audit of the Government's interest in corporations. In describing these procedures the Senate Committee said:

> "In general, the purpose of the government type of audit is to determine the *validity* of expenditures under appropriations made by the Congress, in the light of restrictions and limitations placed by the Congress generally upon the expenditure of appropriated moneys. . . .
>
> "In contrast, the commercial type of audit is separate and apart from the accounting system and internal financial control of the Corporation and is designed to determine the true financial condition of the Corporation as of a given date and the results of its financial operations during the period covered by the audit, as well as establishing whether the funds of the Corporation have been regularly expended in accordance with *corporate* authorization." *Senate Report No. 694, 79th Con-*

gress, First Session 1945, *page* 8 (emphasis supplied).

It is seen that in the case of an ordinary Government agency, the Sovereign has a direct and prime concern in establishing the truth and validity, of each and every claim presented to its financial officers. In the case of a Corporate financial entity, the Sovereign for reasons of policy foregoes that concern and is content to rely upon the accounting methods and business judgment of corporate management, checking those methods as an investor creditor or contributor only within an accepted corporate frame of reference.

In enacting the *Corporation Control Act of* 1945, *supra*, Congress was acutely aware of the possibility that certain corporate instrumentalities might no longer deserve or require independent financial status. It therefore made special provision that upon appropriate recommendation by the budget director, such corporations might become integrated financial instrumentalities of the United States but would neverthless retain *their legal corporate entity* (31 U.S.C. 852). While some question might conceivably arise as to the applicability of the *False Claims Act* to a corporation as to which such action had been taken, clearly no question could arise in the case of a corporation whose legal and financial identity had been as carefully preserved over the years as had that of Commodity Credit Corporation. In 1948 when Commodity Credit Corporation was reconstituted as a Federal corporation under the *Commodity Credit Corporation Charter Act* (15 U.S.C. 714 *et seq.*) the legal and financial status of the Commodity Credit Corporation was given careful review by the Congress. The new Act specifically preserved this authority of the corporation. That statute (15 U.S.C. 714(b) provided that the corporation:

(j) Shall determine the character of and the necessity for its obligations and expenditures and the manner in which they shall be incurred, allowed, and paid.

(k) Shall have authority to make final and conclusive settlement and adjustment of any claims by or against the Corporation or the accounts of its fiscal officers.

In explaining these provisions Congress made it abundabundantly clear that its purpose was to preserve the commercial flexibility of Commodity Credit Corporation through financial autonomy:

"Subsection (j) grants the Corporation the authority, essential to the effective conduct of its business as a corporate entity, to determine the character of and the necessity for its obligations and expenditures and the manner in which they shall be incurred, allowed, and paid. This is a common provision of Federal corporate charters. The Corporation, of course, will be subject to a commercial type of audit by the General Accounting Office under the provisions of the Government Corporation Control Act (31 U.S.C., 1940 ed., Supp. V, 850).

"Subsection (k) explicitly vests in the Corporation the authority, implicit in subsection (j), to make final and conclusive settlement and adjustment of claims by or against the Corporation or the accounts of its fiscal officers. The power has been exercised by the Commodity Credit Corporation since its creation, and the power and its exercise were recognized by the Congress in the act of February 28, 1944 (15 U.S.C., 1940 ed., Supp. V, 713), * * *. *It was stated by the Congress in connection with the provisions of that act, that 'the Commodity Credit Corporation's fiscal responsibility is vested in the Corporation alone and not in the individual fiscal agents. In other words, the fiscal agents are responsible to the Corporation, which in turn is liable to the Federal Government*

> *for the Government's investment in the Corporation.* The examination of the individual accounts of particular fiscal agents with a view to external control and settlement would not facilitate a determination of the financial standing or progress of the Corporation as a whole. Such an examination would, as a matter of fact, seriously interfere with the Corporation's internal financial management and impair the flexibility which is the very basis of the Corporation's existence' (S. Rept. 631, 78th Cong., H. Rept. 846; 78th Cong.)." *H. Rep. No. 1790, 80th Congress Second Session, pp.* 11-12 (emphasis added).

At the time of the introduction of the *Commodity Credit Corporation Charter Act,* a specific section was included in the Senate bill, which would have identified the Commodity Credit Corporation as the Government of the United States and accorded it all the attributes of the Sovereign respecting the legal consequences of its commercial activities. The Senate Committee, in explaining its position in this regard, employed the contention now urged by the Government:

> "Subsection (e) provides that the Corporation shall have the rights, privileges, and immunities of the United States and may assert them in any suit, action, or proceeding. Since the Corporation is an agency of the United States which, in the final instance, will bear any losses suffered by the Corporation, it is desirable that the Corporation be clothed with the rights, privileges, and immunities of the sovereign. The section enumerates, but not by way of limitation, certain of the rights, priorities, and immunities of the United States which would, by virtue of this section, be enjoyed by the Corporation." *Senate Report,* No. 1022, *80th Congress, Second Session,* p. 11.

This provision was specifically rejected by the House of Representatives which amended the subsection by de-

leting the all-inclusive grant of Sovereign rights to Commodity Credit Corporation and limiting these rights to priority in payment from decedents, insolvents and bankrupts. The Senate then acquiesced and the bill which was eventually adopted contained the House amendment (15 U.S.C. 714(e)). Congress therefore not only has granted the Commodity Credit Corporation the power in and of itself to determine and settle claims by and against it, but also has specifically refused to clothe the Corporation with the general attributes of the Sovereign in its exercise of that power. In view of such clear legislative intention, the Government's contention would require judicial legislation in its most offensive extreme.

III

Interpretation by Commodity Credit Corporation That It Is Not the United States or a Department Thereof

Indicative of the fact that Commodity Credit Corporation is not the United States or a department or officer thereof is that agency's administrative interpretation of its exemption from the requirements of 31 U.S.C. 203, the *Assignment of Claim Statute*. Section 203 prohibits all assignments and transfers of claim against the United States "unless they are freely made and executed in the presence of at least two attesting witnesses, *after the allowance of such a claim, the ascertainment of the amount due*, and *the issuing of a warrant for the payment thereof*" (emphasis supplied).

It is pertinent to observe that the assignments provided for Commodity Credit Corporation's 1956 Incentive Payment Program for Shorn Wool do not comply with the requirements of Section 203. We quote from 6 *Code of Federal Regulations* 472.720 (a) and (b) as follows:

"*Assignments*—(a) *Form.* The producer may assign payments which may be determined to be due him under this program for the 1956 marketing year by filing with the ASC county office the original and two copies of CCC Wool Form 57, Assignment of Payment Under National Wool Act of 1954, duly executed by both parties. Such assignment shall be null and void unless it is freely made and (1) is executed by the producer in the presence of at least two attesting witnesses, neither of whom shall be an employee or agent of, or by consanguinity or marriage related to, the assignee; or (2) is acknowledged by the producer before a notary public, a member of the ASC county committee, the ASC county office manager, or a designated employee of such committee. In the case of a joint application for payment, an assignment shall be executed by all those who signed the application.

(b) *Provisions* . . . CCC will make payment pursuant to an accepted assignment unless the ASC county office is furnished evidence of a mutual cancellation of the assignment by both parties thereto or unless the assignee releases the assignment, that is, asks the ASC county office in writing that payment be made to the assignor and not to the assignee."

It is seen that the wool program assignments do not require as conditions precedent the allowance of the claim, the ascertainment of the amount due and the issuance of a claim against the United States. Inasmuch as the requirements for the wool program assignments were established by Commodity Credit Corporation's own power to promulgate regulations (15 U.S.C. 714 b (d)), it is apparent that the requirements of 31 U.S.C. 203 were ignored because Commodity Credit Corporation considered that it was not the "United States" but rather a Federal corporation having an entity distinct from the United States Government. Such conclusion is in accord

with *Providence Engineering Corporation* v. *Downey Shipbuilding Corporation*, 3 F(2) 154, cer. den. 264 U. S. 586, 68 L. Ed. 862, *United States ex rel Skinner & Eddy Corporation* v. *McCarl*, 275 U. S. 1, 72 L. Ed. 131; and Opinion No. 19, 40 *Op. Atty. Gen.* 84, 86.

If Commodity Credit Corporation is not the United States or a departnemt thereof within the meaning of 31 U. S. C. 203, logically and as a matter of proper statutory construction it cannot be, and is not, the United States or a department thereof within the meaning of 31 U. S. C. 231.

CONCLUSION

Because the Commodity Credit Corporation is not the United States of America or a department or officer thereof, we respectfully submit that the judgment of the Court of Appeals for the Eighth Circuit should be reversed.

Respectfully submitted,

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